NOT DESIGNATED FOR PUBLICATION

ALLEN SAMUELS	*	**NO. 2014-CA-0505**
VERSUS	*	
		COURT OF APPEAL
UNITED FIRE AND CASUALTY INSURANCE COMPANY AND CONGREGATION "AGUDATH ACHIM ANSHE SFARD"	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2011-09470, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *
Judge Rosemary Ledet
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Paul A. Bonin, Judge Rosemary Ledet)

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AFFIRMED

OCTOBER 15, 2014

This is a personal injury suit arising out of a slip-and-fall in a synagogue. Allen Samuels commenced this suit against the owner of the synagogue, the Congregation "Agudath Achim Anshe Sfard," and its insurer, United Fire and Casualty Insurance.[1] From the trial court's judgment granting the Congregation's motion for summary judgment, Mr. Samuels appeals. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 9, 2010, Mr. Samuels attended religious services for Rosh Hashana at the Congregation's synagogue located at 2230 Carondelet Street in New Orleans, Louisiana. In his petition, Mr. Samuels avers that as he was walking in the synagogue, "he suddenly slipped and fell on some liquid that was on the floor." As a result of the fall, he alleged that he sustained bodily injuries. In his petition, Mr. Samuels averred that the Congregation was negligent in failing to provide a safe premise, failing to maintain the premises, allowing liquid to remain on the floor, causing liquid to remain on the floor, failing to warn, and other acts of

[1] For ease of discussion, we refer to the defendants collectively as the "Congregation."

negligence. He also averred that the Congregation was strictly liable for "the defective, hazardous and dangerous condition of its premises and particularly the condition of its floors."

Following discovery, the Congregation filed a motion for summary judgment. The Congregation based its motion for summary judgment on La. C.C. art. 2317.1, which expressly imposes a requirement that a plaintiff prove the defendant had knowledge (notice) of the defect.[2] The Congregation contended that it was entitled to summary judgment for the following two reasons:

1. Plaintiff has no evidence that the Congregation was aware of the alleged condition which caused this accident.
2. The Congregation had no knowledge of the alleged condition which caused this accident.

In support of its motion, the Congregation offered a copy of the petition and the deposition testimony of Mr. Samuels and Mr. Berman. The Congregation also offered the following statement of uncontested facts:

- Plaintiff testified in his deposition that he had no knowledge as to the identity of the liquid substance he alleges was on the floor.
- Plaintiff has no knowledge as to how long the liquid substance was on the floor.
- The synagogue was cleaned prior to the first nigh[t] of Rosh Hashana services held on the evening of September 8, 2010.
- None of the approximately twenty-five people who attended the evening service complained of any problem with the floor.
- On the date in question, September 9, 2010, approximately forty-fifty people attended the services.

[2] Under La. C.C. art. 2317.1, a plaintiff must establish the following elements: "[i] defendant knew or should have known of the defect which caused the damage, [ii] that the damage could have been prevented by the use of reasonable care, and [iii] that defendant failed to exercise such care." *Houston v. PNK (Bossier City), Inc*., 13-1991, p. 1 (La. 1/27/14); 132 So.3d 396.

- None of the attendees reported any problems with the floor, liquid or otherwise.

- There was no prior history of any slip-and-fall accidents in the 3 years prior to this accident.

Opposing the summary judgment, Mr. Samuels offered the affidavit of his girlfriend, Paula George, who attested as following regarding the issue of condensation on the floor:

- She has been attending services at [the] Congregation . . . for over ten (10) years.

- A few years prior to the appointment of now President, Benjamin Berman, she handled many of the Congregation's holiday programs and other events and sat on its Board for several years.

- She has first hand knowledge of the periodic condensation issue on the walls and floors of the ground floor entrance hall and social hall of the building.

- She even witnessed the placement of floor mats and other types of blankets at some point or another to help out with the condensation issue.[3]

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[3] In her affidavit, Ms. George also mentioned other issues besides condensation; particularly, she also attested to the following:

- She also has first hand knowledge of the continuing overall moisture problem and excessive dampness existing in the building due to roof leaks attracting termites and causing plaster to fall from the ceiling.

- The flooring on the bottom level of the Congregation in the social hall, began to warp awhile back, and at the time of removal, it was discovered that the flooring had been built on top of soil, and that the Congregation decided to install new flooring in the same manner in the area between the entrance hallway and the first few feet of the social hall while the other termite damaged floor boards were covered with duct tape where the floor boards were eaten through by termites.

- During her tenure on the board, she attempted to have the termite problem treated. . . . She was told by the termite expert that they would not treat the building until it had been made waterproof and the roof repaired, all of which was rejected by the Board of Directors.

- The vinyl tiles in the entrance hallway are damaged, cracked and buckling around the corners and edges showing a lot of wear and other damage due to the overall moisture problem in the building.

When these other defects on the property were raised at the motion for summary judgment hearing, the trial court noted that "the only defect that's of any moment is the defect that caused damages to your client."

Following a hearing, the trial court granted the Congregation's motion for summary judgment and dismissed Mr. Samuels' suit. This appeal followed.

DISCUSSION

This court recently summarized the general standard of review of a trial court's ruling granting a motion for summary judgment, pursuant to La. C.C.P. arts. 966 and 967 and the jurisprudence, in *Mandina, Inc. v. O'Brien*, 13–0085, p. 5 (La. App. 4 Cir. 7/31/13); ___So.3d ___, ___, 2013 WL 3945030, as follows:

> Appellate courts review the grant or denial of a motion for summary judgment de novo, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. This standard of review requires the appellate court to look at the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine if they show that no genuine issue as to a material fact exists, and that the mover is entitled to judgment as a matter of law. A fact is material when its existence or nonexistence may be essential to the plaintiffs [sic] cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, no need for trial on that issue exists and summary judgment is appropriate. To affirm a summary judgment, we must find reasonable minds would inevitably conclude that the mover is entitled to judgment as a matter of the applicable law on the facts before the court.
>
> The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of actions. Summary judgments are favored, and the summary judgment procedure shall be construed to accomplish these ends. The code provides that where [as in the instant case] the party moving for summary judgment will not bear the burden of proof at trial, their burden does not require them to negate all essential elements of the adverse party's claim, but rather to point out to the court that an absence of factual support exists for one or more elements essential to the adverse party's claim. Thereafter, if the adverse party fails to produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial, no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. The adverse party cannot rest on the mere allegations or denials of his pleadings when a motion for summary judgment is made and supported by affidavits, but is

> required to present evidence establishing that material facts are still at issue.

Id.

Mr. Samuels' sole assignment of error is that the trial court erred in granting the Congregation's motion for summary judgment because genuine issues of material fact exist as to whether there is factual support as to each element of his claim. To provide a background for analyzing this issue, we first outline the pertinent deposition testimony introduced by the parties at the summary judgment hearing—the testimony of Mr. Berman and Mr. Samuels.

Mr. Berman's testimony

Mr. Berman testified that, at the time of Mr. Samuels' accident, he had been the Congregation's president for three years. He explained the configuration of the synagogue as including a sanctuary on the second floor and two kitchens (a small and a large one), a social hall, and a small prayer room on the first floor. In the first floor hallway leading to the social hall there was a water cooler—an electric-type, stand up one that holds water jugs. Located off the same hallway was the small prayer room.

It is undisputed that Mr. Samuels' accident occurred sometime after the services that were held on the morning of the second day of Rosh Hashana. On the night before the accident, Mr. Berman testified that the Shabbos goy[4] cleaned the synagogue. If there was anything that needed to be fixed or repaired, Mr. Berman testified that the Shabbos goy would have told him. Neither the Shabbos goy nor anyone else reported any problems regarding the floor to Mr. Berman either the

[4] A Shabbos goy is "a non-Jew employed by Orthodox Jews to perform services (such as turning lights on and off) which are forbidden to Jews on the Sabbath." *Merriam Webster Online*,

night before, or the day of, the accident. Nor were there any accidents at the synagogue during the three years before the accident.

On the morning of the accident, Mr. Berman estimated that forty to fifty people attended the services, which lasted about four hours. Among the attendees were Mr. Berman's six-year-old daughter, Penina Berman; the plaintiff, Mr. Samuels; Mr. Samuel's girlfriend, Ms. George; and a third party, Josh Schraberg. During the services, Mr. Berman testified that he would "come and go at the synagogue between upstairs and downstairs." During that entire time, he testified that he watched Penina and knew exactly where she was.

Following the morning services, a lunch was held for the attendees in the social hall. According to Mr. Berman, Mr. Samuels' accident occurred during the lunch. Mr. Berman testified that someone told him that Mr. Samuels was drinking more alcohol than others. Mr. Berman further testified that he witnessed Mr. Samuels get up from his table in the social hall; walk over towards the small prayer room; and stop in front of the bookcase facing the doorway of the prayer room, which was where Penina and Mr. Schraberg were located. Mr. Berman explained that the reason he was watching Mr. Samuels at that time was because Mr. Samuels was heading in the direction of the general area where Penina was located. Mr. Berman explained that he saw Mr. Samuels take three small steps backwards and land on his butt. He testified that he did not see Mr. Samuels fall; rather, he saw him land on the floor. Mr. Berman estimated that he was located about seventeen feet away from Mr. Samuels when this occurred.

Retrieved September 15, 2014, from http://www.merriam-webster.com.

After the accident, Mr. Berman walked over to check on Mr. Samuels. Mr. Berman asked Mr. Samuels what it was that he believed caused him to fall; immediately upon getting up from the floor, Mr. Samuels answered, stating that "there was water on the floor." Prompted by Mr. Samuels' statement, Mr. Berman examined the floor. In the area where Mr. Samuels fell, Mr. Berman testified that he saw "absolutely no water." He, however, continued looking around and found "three dots ranging from 3/16ths of an inch in a circle of water not in the area where [Mr. Samuels] had fallen, or fell." The dots were in the middle of the hallway a few feet away from where Mr. Samuels fell. Mr. Berman further indicated that there was neither a slip mark of water nor a trail of water. According to Mr. Berman, Mr. Samuels was wearing shorts, which appeared to be dry, and his shoes were dry. When asked whether Mr. Samuels ever complained to him that any condition on the floor, other than a substance on the floor, caused him to slip, Mr. Berman replied that he did not. Mr. Berman, however, testified that a few weeks after the accident, Mr. Samuels came to him with a bottle that he said he found in the synagogue and that he claimed was the container that Penina was carrying on the day of the accident. Mr. Berman denied ever seeing Penina carrying a little bottle or container on the day of the accident.

Mr. Berman acknowledged that a year or so after the accident the Congregation "had some tiles come up and [those tiles] were replaced." Mr. Berman denied that the synagogue ever had sweating floors. He, however, testified that several months after the accident there was a "cold snap" and that the walls sweated and the water ran down causing the floors to be wet. On the occasion of the "cold snap," Mr. Berman testified that he noticed the floors were wet; and he put down blankets to prevent anyone from having a problem. He also made an

announcement upstairs, apparently in the sanctuary, that the floors were wet. He testified that this had not happened, to his knowledge, before that occasion.

Mr. Samuels' testimony

Mr. Samuels, in contrast to Mr. Berman, described the accident as occurring as he was on his way from the services to the social hall for lunch. He explained that it happened in front of the water cooler in the hallway leading to the social hall. When he turned from the stairs and was walking towards the water cooler, Penina came to him at the water cooler. Explaining what occurred next, he testified as follows:

> Well, as I turned into the hallway, Penina was there—that's Benjamin Berman's daughter—and she ran up to me to tell me hello. And she put her arms around me and we, like, walked toward—she had a container in her hand with some kind of liquid in it. I kind of want to think it was light blue and it might have had a blow bubble handle sticking out; I'm not sure. But she was holding it with one of her hands. And we were walking toward the social hall. She was on my left, and she was right next to me, and I slipped.

After he fell, Mr. Samuels remained on the floor for a period of time. When he got up from the floor, he walked over to the social hall where Paula George was sitting to inform her of his fall.

While he was on the floor, Mr. Samuels testified that Mr. Berman came to check on him. According to Mr. Samuels, while he was on the floor he also heard Mr. Schraberg, who had been in the small prayer room, admonish Penina, saying "[y]ou shouldn't be playing with that in here, you should take that outside."[5] Mr. Samuels denied seeing anything on the floor before he fell. He testified that when he was greeted by Penina, he did not look at the floor. He explained that he was

[5] Mr. Samuels testified that he never asked either Ms. George or Mr. Schraberg if they witnessed his fall.

looking at Penina and the container that she had in her hand. Although he admitted that he did not know what Penina had in the container, he testified that "[h]er father said there was only water in there, she only put water." Mr. Samuels denied seeing Penina do anything with the container, such as blow bubbles or something like that.

According to Mr. Samuels, when he got up off the floor, he noticed there was "this liquid on the floor." He indicated that it felt to him "maybe more than just water, maybe some kind of sticky stuff on it that I picked up from the floor." When asked whether his pants were wet, he replied they were wet all over and that "everything felt wet there and a little slimy, too, more than just water it seemed to me." When asked "[w]hat liquid did you see," Mr. Samuels replied that "I don't know what it was." When asked how much, he replied "[a] goodly bit," which he translated to mean "I'm not sure. It just—I remember seeing the floor wet."[6] Mr. Samuels testified that he did not see anyone clean the floor after his fall.

Mr. Samuels also was posed a question about his discovery response regarding the accident. In his discovery response (which was read), Mr. Samuels described the accident as happening as follows: "I slipped and fell on water that was on the floor. I was on my way to the social hall for lunch. After I fell and was injured, someone said the water came from the water cooler." Explaining his discovery response, Mr. Samuels testified that while he was still on the floor after his fall he heard someone, whom he could not identify, state that "the water came from the water cooler." Mr. Samuels was then questioned about his earlier testimony that Penina had something in her hand and whether his belief was that

[6] He testified that he remembered that he was carrying his cane when Penina greeted him, but he did not know what happened to his cane when he fell.

the water—or whatever substance was on the floor—came from that container; he replied: "I don't remember where the water came from, whether it came from there or not. I have no idea. All I know is, after I got up and I fell, I saw the water on the floor."

The applicable substantive law determines materiality; a fact becomes material when "its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery." *Smith v. Our Lady of the Lake Hosp. Inc*, 93–2512, p. 27 (La. 7/5/94); 639 So.2d 730, 751. Hence, "to determine whether a fact is material, a reviewing court must evaluate the substantive law that governs the litigation at issue." *Marseilles Homeowners Condominium Ass'n, Inc. v. Broadmoor, L.L.C.*, 12-1233, p. 17 (La. App. 4 Cir. 2/27/13); 111 So.3d 1099, 1110-11.

This is a "slip-and-fall" case. Mr. Samuels alleges in his petition that the Congregation is liable to him on the basis of negligence and strict liability—the alleged defective, hazardous condition of the floors and premises. To the extent that Mr. Samuels contends that the Congregation is strictly liable as the owner of property having an unreasonably dangerous condition or defect, we note that a more accurate label for his claim is "custodial liability" for the following reason:

> The 1996 amendment enacting La. C.C. art. 2317.1, effective April 16, 1996, abolished the concept of strict liability governed by prior interpretation of La. C.C. art. 2317. A more appropriate term now for liability under La. C.C. arts. 2317 and 2317.1 might be "custodial liability," but such liability is nevertheless predicated upon a finding of negligence.

Jackson v. Brumfield, 09-2142, p. 3 (La. App. 1 Cir. 6/11/10); 40 So.3d 1242, 1243. Likewise, this court noted in *Ambrose v. McLaney*, 06-1181, p. 4 (La. App. 4 Cir. 5/16/07); 959 So.2d 529, 532-33, the following:

> As a result of the 1996 amendments, the former strict liability causes of action provided for under these articles [La. C.C. arts. 2317 and 2322] are now negligence causes of action. Frank L. Maraist & Thomas C. Galligan, *Louisiana Tort Law* § 14–6 (1996)("Maraist & Galligan "). A plaintiff who alleges a negligence cause of action under these former strict liability provisions must prove the following three elements: (i) that the defendant knew or should have known of the vice or defect; (ii) that the damage could have been prevented by the exercise of reasonable care; and (iii) that the defendant failed to exercise reasonable care.

Before the 1996 amendments to the Civil Code, slip-and-fall cases rarely were strict liability cases because a hazardous substance on a defendant's property generally was not considered a defect "in" the defendant's premises. Frank L. Maraist and Thomas C. Galligan, Jr., *Louisiana Tort Law* § 8.05[1] (2d ed. 2013) (hereinafter "*Louisiana Tort Law*"). "If the defect was 'in' the premises, such as a floor slippery by composition, strict liability under La. Civ. Code arts. 2317 and 2322 may have been appropriate. Where the injury-causing condition was merchandise 'on' the premises, the defect was 'on' (and not 'in') the premises, and the building was not unreasonably dangerous." *Id.* Thus, slip-and-fall cases generally were considered ordinary negligence cases.

Before the enactment of La. R.S. 9:2800.6, in slip-and-fall cases Louisiana courts recognized a presumption of negligence, especially in the merchant context. Once the plaintiff showed that the fall occurred and that an injury resulted from a foreign substance on the defendant's premises, the presumption arose and the burden shifted to the defendant to exculpate itself from the presumption. *Id.* The Legislature, by enacting La. R.S. 9:2800.6, effectively eliminated the presumption; however, the statute was not made applicable to all businesses; rather, its application was limited to merchants. La. R.S. 9:2800.6 C(2).

The issue of whether the Congregation falls within the parameter of a "merchant" under La. R.S. 9:2800.6 was raised by Mr. Samuels in his brief to this court. As Mr. Samuels points out, and the Congregation does not dispute, the Congregation does not appear to fall within the parameter of a "merchant," which is defined to mean "one whose business is to sell goods, foods, wares or merchandise at a fixed place of business." La. R.S. 9:2800.6 C(2). Hence, Mr. Samuels contends that his claim based on a defect "on" the premises—a spill—is governed by general negligence principles under La. C.C. art. 2315 and that a duty-risk analysis applies to this claim.[7] He contends that as to this claim "there is **no** requirement for plaintiff to come forward with a 'positive' showing that the Congregation had actual or constructive notice." The Congregation disagrees, but it cites no authority.

The commentators have noted that "[w]here the [merchant] statute is inapplicable, the pre-statutory 'burden shifting' [presumption] may still be applicable." *Louisiana Tort Law* § 8.05[1] (citing *See Mosley v. Methodist Health System Foundation, Inc*., 99-3116, pp. 3-4 (La. App. 4 Cir. 11/15/00); 776 So.2d 21, 23). Indeed, this court in the *Mosley* case applied the presumption in a non-merchant case involving a private hospital defendant. We recognize there is an apparent split in the circuits on this issue of whether notice is required to be positively proven in a negligence case based on a defect "on" the premises against

[7] The duty-risk analysis consists of the following elements: (1) whether the conduct was a cause-in-fact of the harm; (2) the respective duties owed by the parties; (3) whether the requisite duties were breached; and (4) whether the risk and harm caused where within the scope of protection afforded by the duty breached. *Peterson v. Gibraltar Sav. and Loan*, 98-1601, p. 6 (La. 5/18/99); 733 So.2d 1198, 1203-04.

a non-merchant defendant under La. C.C. art. 2315.[8] We, however, find it unnecessary to reach the issue in this appeal because it is unnecessary to a resolution of the issue presented.

On appeal, Mr. Samuels speculates whether it was a defect (hazardous substance) "on" the premises or defect "in" the premises that caused him to fall. [9]

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[8] In *Connelly v. Veterans Administration Hosp.,* 2014 WL 2003098, p. 8 (E.D. La. 2014), the court noted:

> Louisiana's Courts of Appeal are split on whether a plaintiff has the burden of proving that a defendant-hospital had actual or constructive notice of a condition, and the Louisiana Supreme Court has not addressed the issue. While the majority approach involves a burden-shifting scheme that only requires plaintiff to initially prove that her fall occurred and injury resulted from a foreign substance on the premises, the minority has retained the traditional rule requiring the plaintiff to prove that the hospital [non-merchant defendant] had actual or constructive knowledge.

[9] As the commentators point out, *Birdsong v. Hirsch Memorial Coliseum*, 39,101 (La. App. 2 Cir. 12/15/04); 889 So.2d 1232—the only case Mr. Samuels cited in his opposition to the motion for summary judgment—illustrates the interplay between a defect "on" the premises, which is governed by La. R.S. 9:2880.6 or ordinary negligence, and a defect "in" the premises, which is governed by La. C.C. art. 2317.1. Explaining the *Birdsong* case, the commentators note as follows:

> There plaintiff alleged she slipped and fell on something wet on the stairs of an arena at the conclusion of a large entertainment event [a "Disney on Ice" production]. The court concluded that if the damp condition was caused by condensation from humid conditions in the building, La. Civ. Code art. 2317.1 would apply and require a showing of negligence by the arena; however, if the wetness was caused by a spill, the "slip-and-fall" statute, La. R.S. 9:2800.6, may apply, because of the sale of food and drinks on the premises.

Louisiana Tort Law, § 8.05[1], n. 24.

In the *Birdsong* case, the trial court granted the defendant-arena's motion for summary judgment. The court of appeal reversed. In so doing, it noted that the plaintiffs, in their opposition to the motion for summary judgment, presented circumstantial evidence suggesting two possible causes for the large wet area where the accident occurred—either condensation on the floor due to the cold conditions for the ice rink used for the event or spilled drinks or other liquids sold during the event. As to the negligence claim based on a spill, the appellate court emphasized the defendant-arena's admission that during the event it conducted no inspection or cleaning procedures for the floors. The appellate court reasoned the admission raised "an inference that a possible spill by an audience member had remained on the floor for such a period of time that it should have been discovered and removed by [the defendant arena]." *Birdsong*, 39,101 at p. 8; 889 So.2d at 1237. As to the La. C.C. art. 2317.1 claim based on condensation, the appellate court reasoned that "[t]he general dampness of the large area surrounding the place of the fall corroborates this possible cause of the accident." *Birdsong*, 39,101 at p. 8; 889 So.2d at 1236. The appellate court noted that the plaintiff presented one of the defendant-arena's security officer's testimony that the steps became wet from condensation

In support of his claim that it was a defect (hazardous substance) "on" the premises, he cites the possibility that the source of the substance that caused his fall was either Penina's container or the water cooler. In support of his claim that it was a defect "in" the premises that caused his fall, he cites the possibility that it was condensation on the floor or water leaking from the water cooler. Hence, half of the possible causes that Mr. Samuels posits come under the rubric of a defect "in" the premises—the leaking water cooler and condensation—and thus are governed by La. C.C. art. 2317.1, which imposes a notice requirement.

To support a defect (hazardous substance) "on" the premises claim—a traditional slip-and-fall claim—a threshold requirement that the plaintiff must establish is the existence of the hazardous substance on the floor. In this case, the only evidence Mr. Samuels presented to support the existence of a hazardous substance on the floor was his own deposition testimony. His deposition testimony regarding the nature and the existence of an alleged foreign substance on the floor was contradictory. Mr. Samuels denied seeing anything on the floor before he fell; rather, he testified he was not looking at the floor. At one point he testified that, after he fell, he felt his clothes were wet, but he had no idea what the foreign substance on the floor was. At two other points, he testified that he believed the

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when the ice was laid down.

As in *Birdsong, supra*, Mr. Samuels asserts claims based on both a defect "on" and "in" the Congregation's premises. However, unlike the evidence in *Birdsong*, there is no proof in this case of a "large wet area where the accident occurred." Mr. Samuels acknowledged in his deposition that he had no knowledge of the actual substance on the floor, where it came from, or how long it was on the floor. Mr. Berman denies seeing water on the floor where the fall occurred. The synagogue was cleaned the night before the accident. Between forty to fifty people traversed the same area without incident on the day of the accident. Mr. Berman testified that he too traversed the same floor several times on the day of the accident and saw nothing on the floor. No evidence was offered of condensation on the floor at the time of the accident or remotely close to the accident. The *Birdsong* case is thus inapposite.

wet substance on his clothes, and apparently on the floor, was more than just water. When confronted with his discovery response, however, he testified that it was water that he saw on the floor after his fall. Mr. Berman, in contrast, testified that there was no water on the floor in the area where Mr. Samuels fell. Hence, there is a conflict as to whether there was a hazardous substance on the floor, what that substance was, and if it caused Mr. Samuels' fall.

Third, even assuming, *arguendo,* that there was a hazardous substance on the floor, there is a lack of evidentiary support for any of Mr. Samuels' three theories regarding the source of the alleged substance that caused his fall—Penina's container, the water cooler, and condensation. We separately address each theory.

Penina's container

There is no evidence to support Mr. Samuels' theory that any substance on the floor came from the container that Penina was allegedly carrying. Mr. Samuels acknowledges that neither he nor anyone else he could identity saw Penina spill—or as the trial court put it "deposit"—anything on the floor. Indeed, Mr. Berman denied even seeing his daughter carrying a container on the day of the accident. Moreover, since Mr. Samuels was walking immediately next to Penina when he fell, there is no evidence that anything she could have spilled was present on the floor for any significant length of time before the accident.

The water cooler

In his deposition, Mr. Samuels only reference to the water cooler as a possible source of the hazardous substance was his statement, explaining his discovery response, that he heard some unidentified person state that the water came from the water cooler. Mr. Samuels, however, acknowledged elsewhere in

his deposition that he did not know the origin of the water, or other substance, on the floor. In contrast, in his opposition to the motion for summary judgment, Mr. Samuels enumerates the following three possibilities as to how the substance could have originated from the water cooler: (i) it could have leaked from the water cooler; (ii) it could have been spilled on the floor directly from the water cooler; and (iii) it could have been spilled by someone retrieving water from the cooler. At the hearing on the motion for summary judgment, Mr. Samuels argued that the fact he fell in front of the water cooler, as opposed to another location in the synagogue such as on the steps, was sufficient to establish notice. The trial court found this argument unpersuasive. We agree. As the Congregation put it, Mr. Samuels only could speculate that "there MAY have been water on the floor and it MAY have come from the water cooler." Again, Mr. Berman's testimony was that there was "absolutely no water" in the area where Mr. Samuels fell.

Condensation

In his deposition, Mr. Samuels stated that he was told by Ms. George that there was a condensation problem in the synagogue. In an attempt to support his theory that condensation on the floor was a possible cause of the accident, Mr. Samuels introduced Ms. George's affidavit, which is quoted earlier in this opinion. The Congregation contends that the trial court should have stricken Ms. George's affidavit because it was not based on personal knowledge and because she was not an expert. Regardless, the Congregation contends that her affidavit is insufficient to support Mr. Samuels' theory that condensation caused the accident. The Congregation points out that Ms. George's affidavit fails to show that she saw the accident or that she saw anything, including condensation, on the floor before or after the accident. The Congregation further points out that her affidavit fails to

show that she spoke to anyone associated with the Congregation the night before the accident advising that the floor had condensation or that she told anyone that she saw condensation on the floor at any time before or after the accident. Hence, the Congregation contends that Ms. George's affidavit does not establish that condensation on the floor caused this accident. We agree. Even if considered, Ms. George's affidavit offers no proof of condensation on the floor at the time of, or remotely before, Mr. Samuels' fall. Moreover, Mr. Berman testified that the only time, in his experience at the synagogue, that the synagogue had a condensation problem was when there was a "cold snap" several months after Mr. Samuels' accident.

The jurisprudence has held that "speculation, conjecture, mere possibility, and even unsupported probabilities are not sufficient to prove a plaintiff's claim." *Hebert v. Rapides Parish Police Jury*, 06-2001, 06-2164, p. 8 (La. 4/11/07); 974 So.2d 635, 642 (citing *Coon v. Placid Oil Co*., 493 So.2d 1236, 1240 (La. App. 3d Cir. 1986)); see also *Todd v. State Through Social Services*, 96-3090, p. 16 (La. 9/9/97); 699 So.2d 35, 43 (noting that "[p]roof which establishes only possibility, speculation, or unsupported probability does not suffice to establish a claim"); *Rivers v. Broussard*, 06–1543, p. 5 (La. App. 3 Cir. 6/27/07); 964 So.2d 411, 414 (citing *Todd, supra,* in support of decision to affirm summary judgment given "the record shows there was no evidence, other than speculation, that any defect in the road existed."). Such is the case here.

Mr. Samuels' position is that the cause of his fall was a substance on the floor coming from one of three possible sources. The Congregation's counter position is that the mere fact Mr. Samuels speculates on three possible sources of the substance that he alleges was on the floor "unequivocally demonstrates that

plaintiff does not know what substance, if any, was on the floor." The trial court, similar to the Congregation, posed the following question to Mr. Samuels: "if you don't know what caused the accident, how do we get to where you can meet your burden?" Agreeing with the trial court and the Congregation, we conclude that Mr. Samuels' speculation as to the source of the substance or defect that caused his fall is insufficient to establish a genuine issue of material fact. "Such allegations, inferences, and speculations [that there was water or another foreign substance from Penina's container, the water cooler, or condensation on the floor] are not sufficient to create a genuine issue of material fact." *Smith v. Casino New Orleans Casino*, 12–0292, p. 11 (La. App. 4 Cir. 10/3/12); 101 So.3d 507, 514; *see also Reed v. Home Depot USA, Inc*., 37,000, p. 3 (La. App. 2 Cir. 4/9/03); 843 So.2d 588, 590 (noting that speculation as to the cause of an accident does not supply the factual support required to meet the plaintiff's evidentiary burden and citing *Babin v. Winn–Dixie La. Inc*., 00-0078 (La. 6/30/00); 764 So.2d 37). Accordingly, we find that the trial court did not err in granting the Congregation's motion for summary judgment.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED